In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTERS CLUBS, and CONTRA COSTA COUNTY COMMUTERS ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES, and THE GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the Northern District of California, Southern Division

Brief for Appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation

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OPINIONS OF THE COURT BELOW AND OF THE INTERSTATE COMMERCE COMMISSION

The opinions of the court below are reported at 150 F. Supp. 619 (N.D. Cal. 1957) and are set forth in the printed transcript of record, pages 111 to 124, (herein referred to as "Tr.").

The Interstate Commerce Commission's report and order dated July 6, 1955 are reported in full at 65 M.C.C. 347 and are set forth in the transcript at Tr. 8 to 41.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This is a direct appeal from a final judgment entered on May 3, 1957 by a District Court of three judges specially constituted pursuant to Sections 2284 and 2325 of Title 28 of the United States Code, pages 4411 and 4413. The judgment dismissed appellants' complaint, which sought to set aside and annul an order of the Interstate Commerce Commission, and denied appellants' motion for leave to amend the complaint.

Jurisdiction of this Court is invoked under Sections 1253 and 2101 of Title 28 of the United States Code, pages 4181 and 4402, and Section 45 of Title 49 of the United States Code, page 7155.

STATUTES AND RULES WHICH ARE INVOLVED

This appeal involves the interpretation of Sections 5 and 212(b) of the Interstate Commerce Act (49 U.S.C. §§ 5 and 312(b), 1952 Ed., Vol. 5, pp. 7116-7118 and 7191) and Rule 15 of the Federal Rules of Civil Procedure (28 U.S.C. foll. § 2072, 1952 Ed., Vol. 3, p. 4306).

The pertinent text of these statutes and rules is set forth in the appendix to this brief. The text of Section 408 of the Civil Aeronautics Act (49 U.S.C. § 488, 1952 Ed., Vol. 5, pp. 7222-7223) is also set forth in the appendix.

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this appeal are:

1. Whether the court below correctly decided that the Interstate Commerce Commission has exclusive and plenary jurisdiction under Section 5 of the Interstate Commerce Act

to authorize a transaction under which a common carrier by motor vehicle would acquire control of a newly organized motor carrier to whom certain interstate and intrastate operating rights and properties would be concurrently transferred by the corporation acquiring such control.

2. Whether the court below abused its discretion in denying plaintiffs leave to amend their complaint where the motion was tardily filed after the only issue raised by the complaint had been heard and where the failure to include the additional issues in the original complaint was not due to inadvertence or oversight.

During a period of more than fifteen years, in an unbroken line of decisions, the Interstate Commerce Commission has exercised its jurisdiction under Section 5 of the Interstate Commerce Act to authorize comparable transactions. The Commission's authority is plainly declared by statutory provision and supported, without exception, by all reported authority.

STATEMENT OF THE CASE

On February 8, 1954, Pacific Greyhound Lines, Golden Gate Transit Lines and The Greyhound Corporation (herein called "Pacific", "Golden Gate" and "Greyhound", respectively) filed joint applications with the Interstate Commerce Commission (herein called "the Commission") for an appropriate order, under Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (herein called "the Act"), authorizing a transaction under which (1) Pacific would acquire control of Golden Gate through ownership of capital stock; (2) Pacific would transfer certain properties and operating rights to Golden Gate; (3) Greyhound would acquire control of Golden Gate through Pacific; and (4) by a separate application as a matter directly related to the applications under Section 5, Pacific would continue operations over

portions of the routes to be transferred to Golden Gate. (The foregoing requested authorization will herein be called "the transaction".)

When the joint applications were filed Pacific was a common carrier of passengers by motor vehicle in both interstate and intrastate commerce in seven states in the western United States. The transaction described in footnote 2 of the Commission's report (Tr. 9) has now been consummated. Pacific has been merged into Greyhound and Pacific's operations are presently being conducted by Greyhound.* Golden Gate is a newly organized corporation authorized by its articles to engage in the transportation of passengers by motor vehicle. Golden Gate is not presently an operating common carrier, but it will become such upon consummation of the transaction authorized by the Commission's order. The operating rights to be transferred to Golden Gate include both intrastate and interstate services,† and comprehend local operations for distances up to 25 or 30 miles in the San Francisco Bay area, styled by the Commission "commuter operations" (Tr. 11). These operations accounted for approximately 35% of the total number of passengers being transported by Pacific when the joint applications were filed (Tr. 11). In addition to the operating rights to be transferred, Golden Gate would also receive $250,000 in cash, 190 buses with the right to lease up to 100 additional buses from Greyhound, and certain other assets amounting to approximately $1,555,000, in the aggregate (Tr. 12, 13,

*Under the law of the State of Delaware which is applicable to that merger, pending actions by or against the merged corporation may proceed as if the merger had not taken place.

†The interstate traffic of Golden Gate would produce 5.7% of its total revenues according to the estimate of the Interstate Commerce Commission. Golden Gate's intrastate fares would continue to be subject to the regulatory jurisdiction of the California Public Utilities Commission to the same extent as at present (Tr. 29).

17, and 29). It is expected that approximately 310 drivers and between 34 and 44 other employees would be transferred to Golden Gate (Tr. 14). If Golden Gate had operated for the entire year 1953 over the routes to be transferred, it would have received an estimated $3,694,600 in passenger revenues from both its interstate and intrastate traffic (Tr. 16).

At the public hearing on these applications, appellants County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs and Contra Costa County Commuters Association, plaintiffs below, appeared to oppose the applications. The applications were also opposed by representatives of Pacific's employees (herein called "the Union") who were plaintiffs below.* Following the public hearing briefs were filed, an Examiner's proposed report was issued, exceptions thereto were filed and oral argument was had before the full Commission. By its report and order dated July 6, 1955, 65 M.C.C. 347 (Tr. 8 to 41), the Commission, without dissent, found *inter alia* that the transaction was within the scope of Section 5(2)(a) of the Act, that the transaction was consistent with the public interest, and that an appropriate order should be entered approving and authorizing the transaction. Appellants' (protestants before the Commission) petition for rehearing and reconsideration was denied.† In concluding that the transaction was consistent with the public interest, the Commission found that the following were some of the benefits to be in prospect:

*By stipulation and order of court prior to entry of judgment, Civil Action No. 34985 and the complaint on file therein were dismissed as to the Union.

†The Commission's order originally provided that unless the transaction was consummated within 180 days from the effective date of the order the authorization would be terminated. This period has from time to time been extended, the current expiration date being June 16, 1958.

(1) Elimination of the burden on interstate commerce occasioned by operating deficits resulting from inadequate fares on local services thereby requiring such deficits to be defrayed out of Pacific's revenue from the transportation of long-haul interstate passengers (Tr. 17-20, 28);

(2) Separation of "highly dissimilar" local and long-haul operations (Tr. 27);

(3) Completely separate management experienced in local rather than long-haul operations (Tr. 28);

(4) Improvement of labor-management relations (Tr. 21, 29);

(5) Improvement of public relations (Tr. 28);

(6) Facilitation of ultimate integration into the contemplated rapid transit system (Tr. 29).

On October 18, 1955, plaintiffs (appellants herein) commenced Civil Action No. 34985 to annul this order of the Commission. The complaint tendered but a single issue of law—whether the Commission exceeded its jurisdiction in approving and authorizing the transaction. Pacific, Golden Gate and Greyhound intervened as defendants, and, after the statutory three-judge District Court was convened, moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The United States and the Commission, after answering, jointly moved for judgment on the pleadings; appellants likewise moved for judgment on the pleadings. During final argument on these motions appellants made their initial request for permission to amend the complaint. Following submission of the motions directed to the original complaint, appellants filed a written motion for leave to amend the complaint by adding allegations challenging the Commission's finding that the transaction was consistent with the public interest, as well

as many subsidiary findings, and by adding an allegation that the Commission abused its discretion in denying appellants' petition for rehearing and reconsideration. After argument, both oral and written, this motion was submitted for decision.

By its opinion dated April 12, 1957, the court granted the motion of defendants for judgment on the pleadings and the motion of defendants in intervention to dismiss the complaint, and denied plaintiffs' motion for leave to amend the complaint. All members of the court below concurred in the majority opinion upholding the jurisdiction of the Commission; Judge Harris dissented solely from denial of the motion for leave to amend. On May 29, 1957, appellants filed their notice of appeal from the judgment entered on May 3, 1957 (Tr. 124-8). After the jurisdictional statement was filed, all appellees moved to affirm. On November 12, 1957, probable jurisdiction was noted (Tr. 131, 355 U.S. 866, 78 S.Ct. 116).

SUMMARY OF ARGUMENT

I. The Court Below Has Correctly Decided That Acquisition of Control of Golden Gate by Pacific and by Greyhound Is a Transaction Within the Scope of Section 5 of the Interstate Commerce Act.

The terms of Section 5, a uniform line of Commission decisions and all pertinent reported court cases are opposed to appellants' contention that Section 5 of the Act does not comprehend jurisdiction in the Commission to authorize acquisition of control of a newly organized carrier to which certain interstate and intrastate operating rights and properties would be concurrently transferred by the corporation acquiring such control.

A. THE INTERSTATE COMMERCE ACT.

The authority exercised by the Commission in approving the transaction is derived from Section 5(2)(a) of the Act, making it lawful with the approval of the Commission, "* * * for any carrier * * * to acquire control of another through ownership of its stock or otherwise; * * *". The jurisdiction conferred by the statute expressly extends to any carrier or corporation "resulting from any transaction approved by the Commission," and any unauthorized acquisition of control of such carrier is unlawful "however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever." The jurisdiction lodged with the Commission is declared to be "exclusive and plenary" and any carrier participating in the transaction authorized by the Commission may carry the transaction into effect "without invoking any approval under State authority." As the court below held, Section 5 makes it unlawful both for Golden Gate to engage in the contemplated services and for Greyhound to acquire control of Golden Gate until and unless such operations and acquisition of control have been authorized by the Commission.

The main thrust of appellants' argument on the jurisdictional question is to the effect that the legislative history of Section 5 shows an intention to exclude so-called "split-ups." Neither the legislative history nor the terms of Section 5 lends support to appellants' contention. Although the dominant purpose of the Transportation Act of 1940 was to foster voluntary mergers and consolidations, there is no indication that Congress thereby intended to deprive the Commission of jurisdiction over all forms of common control transactions. There is nothing in the legislative history which detracts from the force of Section 5(4) of the Act by which unauthorized acquisitions of control are made unlawful "*however such result is attained.*" Appellants'

version of the Congressional purpose underlying Section 5, in the words of the court below, "ignores the whole regulatory scheme of the Interstate Commerce Act."

B. COMMISSION DECISIONS.

Without exception in a uniform line of cases covering a period of more than 15 years, the Interstate Commerce Commission has construed Section 5 to govern transactions comparable to the Golden Gate transaction. This long continued and generally unchallenged construction of Section 5 by the Commission is entitled to great weight and should not be overturned except for compelling reasons.

C. COURT DECISIONS.

The Commission's exercise of its jurisdiction in authorizing the acquisition of control of Golden Gate accords with a series of decisions of this Court covering a period of more than 25 years. These decisions construe Section 5 of the Act so as to confer upon the Interstate Commerce Commission the duty to control capital structures, physical make-up and relations between carriers in the light of the public interest in an efficient national transportation system, regardless of State law. This Court has given broad scope to the term "acquisition of control" as employed by Congress and has rejected artificial distinctions such as that suggested by appellants.

In a series of decisions arising under the Civil Aeronautics Act, the identical issue was raised respecting the jurisdiction of the Civil Aeronautics Board. In each of these cases, the courts refused to restrict the common control provisions of the Civil Aeronautics Act to cases where the acquisition of control occurred at a time when the person being controlled was already an operating air carrier.

D. THE POTENTIAL JURISDICTIONAL VOID.

Appellants' theory of the limited scope of Section 5 would afford avenues for successful evasion of the statutory objective, as this Court, other courts and the Commission have recognized. If the authority of the Interstate Commerce Commission or of the Civil Aeronautics Board were to be restricted to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the agency's approval, a carrier could eliminate competitors without the agency's approval, a rail carrier could acquire control of a motor carrier without the Commission's approval and a surface carrier could acquire control of an air carrier without the approval of the Civil Aeronautics Board. These and other avenues for evasion would immediately appear.

In an effort to close this void in the regulatory structure, appellants argue that the Commission should have acted under the limited jurisdiction conferred by Section 212(b) of the Act. However, this section is expressly made inapplicable to a transaction governed by Section 5. Since one of the elements of the transaction herein is the acquisition of control of Golden Gate, the transaction is subject to Section 5 rather than Section 212(b).

E. THE EXCLUSIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

When an order has been made in accordance with Section 5 of the Act, it conveys authority permitting such transaction to be carried into effect "without invoking any approval under State authority," the Commission's authority being declared to be "exclusive and plenary." Of necessity, when interstate and intrastate services are inextricably intertwined, the federal authority over both is complete and paramount. In exercising under Section 5 its exclusive and

plenary jurisdiction to approve and authorize the Golden Gate transaction, the Commission has not deprived the State Commission of its jurisdiction to regulate Golden Gate's intrastate rates.

II. There Was No Abuse of Discretion by the Court Below in Denying Appellants' Leave to Amend Their Complaint.

The complaint as filed on October 18, 1955, raised but a single issue of law—whether the transaction was within the scope of Section 5 of the Act. By the motion for leave to amend, belatedly tendered in the course of the hearing of the cause before the three-judge court, appellants sought to challenge the Commission's finding that the transaction was consistent with the public interest and to question the sufficiency of the supporting evidence of record. The issue before this court is whether the District Court abused its discretion by denying this motion.

Appellants had ample opportunity prior to final argument before the District Court to bring before the court all issues deemed by them to be pertinent. The court's denial of leave to amend is justified by the following circumstances: (1) counsel for appellants expressly stated that his failure to include these additional issues in the complaint as filed was not due to inadvertence or oversight, but reflected his deliberate choice; (2) counsel for appellants advised appellees shortly prior to the trial of the cause, as he also advised the District Court in a letter addressed to its Clerk, that the sole issue which he would present at the hearing was the jurisdictional issue; (3) counsel for appellants did not and could not plead unfamiliarity with the record since he represented appellants throughout the proceedings before the Commission; (4) the initial suggestion as to a prospective motion to amend was not forthcoming until the case was being heard; (5) when formal motion for leave to amend the

complaint was made after the case had been submitted, counsel for appellants expanded the proposed amendment so as to comprehend further elements not included in his original request; (6) the sole attempted justification advanced implied that appellants had lost confidence in the only issue raised by their original complaint and therefore had decided to raise additional issues. Their decision not to challenge the Commission's findings was advisedly made: if these findings had not been deemed by appellants to be fully supported by the record, there can be no doubt that the findings would have been challenged in the original complaint.

The sole reason of a substantive character offered in justification of appellants' proposed amendment was that appellants' counsel was influenced by the negotiation of a labor contract. However, the negotiation was undertaken in response to the mandate of the Commission and the fact of such negotiation expressly confirms the Commission's findings respecting the labor-management problem under existing conditions.

The policy respecting amendments cannot be so "liberal" as to frustrate the express Congressional intent to accomplish expedition in judicial review of orders of the Commission. Granting that there should be a liberal policy in permitting amendments, it does not follow that amendment should be allowed as of course and without good cause shown. Appellants' *seriatim* attack on the Commission's order is in direct conflict with the procedure specifically required by Congress in providing a special method for judicial review of orders of the Interstate Commerce Commission by which Congress sought to avert the delays ordinarily incident to litigation.

That the District Court exercised proper discretion finds further warrant in the prejudice which appellees would have

suffered had the amendments been allowed. The proposed amendments would necessarily have delayed final submission of the case for a substantial period of time. Had the amendments been allowed, the public, as well as Greyhound, would have been prejudiced by the extension, for an indefinite period, of the burdens and disadvantages resulting from what the Commission has termed "the impractical retention in a single entity of highly dissimilar operations" which, as the Commission adds, "causes the undesirable results shown by this record". The Interstate Commerce Commission itself would have been prejudiced by approval of a practice which would materially aggravate the burden resting upon the Commission in defending its orders.

It is well settled that motions to amend a pleading are within the sound discretion of the trial court, and upon this record there can be no warrant for finding an abuse of discretion on the part of the court below.

ARGUMENT

Introductory

The appeal in this cause raises only two issues: (1) Appellants' contention that the Commission did not have jurisdiction under Section 5 of the Act to approve the transaction; and (2) Appellants' contention that it was an abuse of discretion for the court below to deny the motion for leave to amend the complaint. Both of these contentions proceed from a misconception of Section 5 of the Act. This brief on behalf of appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, will deal with these two issues in order.

I. The Court Below Has Correctly Decided That Acquisition of Control of Golden Gate by Pacific and by Greyhound Is a Transaction Within the Scope of Section 5 of the Interstate Commerce Act.

Appellants would carve out of Section 5 of the Act transactions which they describe as "split-ups", notwithstanding the absence of any statutory distinction between "split-ups" and other common control transactions. The terms of Section 5, a uniform line of Commission decisions and all pertinent reported court cases are opposed to appellants' construction of Section 5.

A. THE INTERSTATE COMMERCE ACT.

Appellants contend that the Commission does not have jurisdiction under Section 5 of the Act to authorize Pacific and Greyhound to acquire control of Golden Gate because Golden Gate is not presently an operating common carrier. The transaction approved by the Commission contemplates that Golden Gate will become an operating common carrier concurrently with the issuance of its capital stock whereby Pacific and Greyhound will acquire control of Golden Gate. The only jurisdictional question is whether Section 5 applies to an acquisition of control in cases where the corporation being controlled will become an operating common carrier concurrently with consummation of the transaction, but not before. In the terms of the statute, the question is whether the transaction constitutes an acquisition of control, "whether directly or indirectly", by "any carrier, or two or more carriers jointly, * * * of another through ownership of its stock or otherwise".

The authority exercised by the Commission in approving the transaction is derived from Section 5(2)(a) of the Act, which provides, *inter alia*, that it shall be lawful, with the approval and authorization of the Commission,

"* * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *"

Congress has not only provided that approval of such a transaction by the Commission is required, but it has declared in plain and unambiguous language in Section 5(4) of the Act that:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate * * * the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever."*

Still more instructively, Section 5(11) of the Act declares that:

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or *resulting from any transaction approved by the Commission thereunder*, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; * * *" (Emphasis supplied.)

The transaction approved by the Commission comes precisely within the terms and scope of Section 5. The juris-

*Appellants appear to recognize the pertinence of Section 5(4) of the Act since this portion of Section 5 is set forth in Section III of appellants' brief, under the caption "Statutes Involved" (p. 4). However, appellants' brief is otherwise lacking in any discussion of Section 5(4).

diction conferred by the statute expressly extends to any carrier or corporation "*resulting from any transaction approved by the Commission*", and any unauthorized acquisition of control of such carrier is unlawful "however such result is attained, whether directly or indirectly, * * * *or in any other manner whatsoever.*" It is plain that Golden Gate will be a carrier "resulting" from the transaction here approved by the Commission and that Greyhound could not acquire control of Golden Gate without receiving prior authorization from the Commission. The Congress could not have found terms more aptly comprehending acquisition of control through what appellants have termed "split-ups". Advisedly, and necessarily, Congress left no such hiatus in the Commission's authority as is here urged by appellants.

In unmistakable terms, Section 5 makes it unlawful both for Golden Gate to engage in the contemplated services and for Greyhound to acquire control of Golden Gate until and unless such operations and acquisition of control have been authorized by the Commission. The court below correctly so held, stating succinctly:

> "We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock." (Tr. 113)

Greyhound's acquisition of control of Golden Gate would be concurrent with its becoming a carrier through consummation of the transaction. Golden Gate will be a carrier

"resulting" from the transaction authorized by the Commission, a carrier which Greyhound did not control prior to consummation of the transaction; Greyhound's acquisition of control of this new carrier would be in direct violation of Section 5(4) of the Act if not approved and authorized by the Commission.

As noted by the court below, the main thrust of appellants' argument on the jurisdictional question is to the effect that the legislative history of Section 5 shows an intention to exclude so-called "split-ups" from Section 5. Neither the legislative history nor the terms of Section 5 lends support to appellants' contention.

Appellants have referred to portions of the legislative history of the Transportation Act of 1940 (54 Stat. 898); this legislation relieved the Commission of formulating a nationwide plan of consolidation and restored the initiative to the carriers. *Schwabacher v. United States*, 334 U.S. 182, 193 (1948). As they read this legislative history, it shows a Congressional purpose to promote only voluntary mergers and consolidations without at the same time giving the Commission jurisdiction over "split-ups". However, they are reading into this legislative history something which is not there. It is, of course, clear that the dominant purpose of the 1940 Act was to foster voluntary mergers and consolidations; but it does not follow that Congress thereby intended to deprive the Commission of jurisdiction over all forms of common control transactions, including so-called "split-ups". On the contrary, the Commission already had jurisdiction under Section 5, as amended by the Transportation Act of 1920, 41 Stat. 456, "regardless of state law, to control rate and capital structures, physical make-up and relations between carriers * * *". *Schwabacher v. United States*, 334 U.S. 182, 192 (1948). There is nothing

in the legislative history cited by appellants which even suggests that Congress intended, by the 1940 Act, to deprive the Commission of any portion of its jurisdiction over acquisitions of control. There is nothing in this history which detracts from the force of Section 5(4) of the Act by which unauthorized acquisitions of control are made unlawful, "however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever." This statutory language shows a clear Congressional purpose to confer upon the Commission jurisdiction over any and all forms of acquisitions of control *however such result is attained*. We have previously pointed out that Greyhound, as a result of the transaction herein, will acquire control of Golden Gate. This acquisition of control would be unlawful without the approval of the Commission for it is clear that Congress intended to include common control transactions within the sweep of the regulatory statute. In the words of the court below:

> "* * * we think the plaintiff's version of Congressional purpose underlying Section 5 is too narrow, and that it ignores the whole regulatory scheme of the Interstate Commerce Act.
>
> * * * * * * *
>
> "So far as it was the purpose of congress to have the Interstate Commerce Commission control the capital structure, physical make-up and relations between carriers under the power conferred by Section 5, we are unable to read out of the statute the transaction at hand." (Tr. 113-4)

B. COMMISSION DECISIONS.

Without a single exception, the Commission in numerous cases has construed Section 5 to govern transactions comparable to the transaction herein. In its report and order

approving and authorizing the transaction, the Commission stated that:

> "Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under Section 5." (Tr. 23)

This exercise of the Commission's jurisdiction under Section 5 is in conformity with a uniform line of Commission decisions covering a period of more than fifteen years preceding the ruling herein.* Subsequent Commission decisions authorizing comparable transactions have consistently applied the same principles.†

The Commission's exercise of jurisdiction herein is plainly authorized by the terms of Section 5, since Golden Gate will become a carrier concurrently with the acquisition of its control by Greyhound. This is a type of transaction specifically covered by Section 5(2) and within the prohibition of Section 5(4) of the Act, absent Commission approval. Such has been the long continued and generally unchallenged construction of Section 5 by the Commission. This

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*During this period of more than fifteen years, the Commission has frequently and consistently made rulings in conformity with its report and order herein. The following are representative: *Columbia Motor Service Co.—Purchase*, 35 M.C.C. 531, 534 (1940); *Consolidated Freightways, Inc. — Control — Consolidated Convoy Co.*, 36 M.C.C. 358, 359 (1941); *Takin — Purchase*, 37 M.C.C. 626, 627 (1941); *A. & W. Motor Lines—Purchase*, 38 M.C.C. 407 (1942); *Interstate Motor Freight System, Inc.—Purchase*, 39 M.C.C. 207, 208 (1943); *Transit, Inc.—Purchase*, 50 M.C.C. 433, 434 (1948); *Gehlhaus and Hollobinko — Control*, 60 M.C.C. 167, 169 (1954); *Southern Pacific Company Reincorporation*, 267 I.C.C. 523 (1947).

†See, for example, *Mickow Corp. — Purchase*, 65 M.C.C. 541 (1955); *Colonial Fast Freight Lines, Inc. — Purchase*, 65 M.C.C. 619 (1956); and *Clark Transfer, Inc.—Purchase—Highway Express Lines, Inc.*, 70 M.C.C. 579 (1957).

Court has frequently stated that the contemporaneous construction of a statute by the agency charged with its administration, particularly if long continued as in this case, is entitled to great weight when the court on review is construing the statute in question.

United States v. Public Utilities Commission of California, 345 U.S. 295, 315 (1953);

United States v. American Trucking Associations, 310 U.S. 534, 549 (1940);

Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933);

United States v. Chicago North Shore R. Co., 288 U.S. 1 (1932);

Wisconsin v. Illinois, 278 U.S. 367, 413 (1929).

As aptly stated by Mr. Justice Cardozo in the *Norwegian Nitrogen* case, "True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." (288 U.S. at 315)*

C. COURT DECISIONS.

The Commission's exercise of its jurisdiction under Section 5 in approving and authorizing the transaction whereby Greyhound would acquire control of Golden Gate is not only consistent with a uniform line of Commission decisions

*Appellants seem to suggest that Commission decisions have some infirmity in cases where there were no protestants (Brief of appellants, pp. 38-9). This implied criticism of the Commission hardly seems justified since the Commission is charged with the duty to protect the public interest and in discharging this duty it must necessarily endeavor to remain within jurisdictional limitations prescribed by Congress. Furthermore in many of the cases forming the uniform line to which we have referred, opposing parties were represented by counsel and the jurisdictional issue was fully argued in advance of its submission to the Commission for decision.

but also accords with decisions of this Court construing Section 5 of the Act. These decisions, commencing with *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932) to and including the latest case, *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), cover a period of more than 25 years and fully support the ruling of the Commission and the judgment entered by the court below.

The *New York Central Securities Corp.* case held that Commission approval under Section 5 was required where the transaction was a lease to the parent corporation of the properties of its subsidiary. This court held that there was an acquisition of control even though the parent was already in control of the carrier properties through its ownership of the capital stock of the subsidiary and the transaction represented merely a change in the form of control. Twelve years later in *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944), this Court again construed the common control provisions of Section 5 of the Act. The transaction which was there held to be subject in its *entirety* to the jurisdiction of the Commission under Section 5(2) was the acquisition of the property and franchises of one carrier by another carrier, which was in turn controlled by a non-carrier. The Commission's conclusion that this transaction involved the acquisition of control of the first or vendor-carrier by the non-carrier parent of the vendee, was upheld. See, also, *McLean Trucking Co. v. United States*, 321 U.S. 67, 78-83 (1944) where this Court, in a case which involved the acquisition of control of eight motor carriers and consolidation of their operating rights into one surviving carrier, traced the history of Section 5 of the Act, with particular reference to its application to motor carriers.

The next decision in this series is *Schwabacher v. United States*, 334 U.S. 182 (1948), which involved the authority of the Commission over the rights of dissenting shareholders in a merger transaction. In *Schwabacher* this Court referred to a series of decisions construing Section 5 of the Act, as amended by the Transportation Act of 1920, 41 Stat. 456, summarizing these decisions as follows:

> "The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, *regardless of state law*, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system [Citations omitted]." (334 U.S. at 192) (Emphasis supplied.)

Last Term once again this Court was asked to construe "acquisition of control" as that term appears in Section 5. *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957) held that a rearrangement within a railroad system constituted an "acquisition of control" under Section 5(2) of the Act. The Commission had jurisdiction to approve or disapprove such rearrangement within a railroad system notwithstanding the fact that the parents already controlled the subsidiary and the transaction represented only a change in the form of control. In the *Alleghany Corporation* case this Court said:

> "In 1939, in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146, arising under the Federal Communications Act, 48 Stat. 1064, 1065, 47 U.S.C. § 152(b), this Court rejected artificial tests for 'control', and left its determination in a particular case as a practical concept to the agency charged with enforcement. This was the broad scope designed for 'control' as employed by Congress in the Transportation Act of

1940, 54 Stat. 899-900, 49 U.S.C. § 1(3)(b). See *United States v. Marshall Transport Co.*, 322 U.S. 31, 38.

* * * * * * *

"Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under § 5(2)." (353 U.S. at 163-4, 166)

The plain language of Section 5 and this series of decisions make it abundantly clear that the Commission had full authority to approve and authorize the transaction and that the transaction could not be accomplished without such prior approval. Under the broad scope designed for "control" as employed by Congress and in order to control capital structures, physical make-up and relations between carriers, manifestly the Commission must have authority over a carrier's acquisition of control of another carrier which becomes such concurrently with consummation of the transaction. Any unapproved acquisitions of such control would violate Section 5(4) of the Act. A distinction between "split-ups" and other common control transactions would be artificial, would be without foundation in the statute and would be directly in conflict with this series of decisions of this Court.

Another series of decisions gives further emphasis to the conclusion that appellants' challenge to the jurisdiction of the Commission cannot be sustained. Section 408 of the Civil Aeronautics Act, 49 U.S.C. § 488, as noted by the court below, is comparable to Section 5 of the Interstate Commerce Act, both provisions being directed to a common objective. Appellants here contend that the transaction is not within the scope of Section 5 because Golden Gate is not yet an operating common carrier. In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.2d 810 (C.A.

2d 1941) the identical issue was raised respecting the jurisdiction of the Civil Aeronautics Board. Application was made to the Civil Aeronautics Board for a certificate to permit a newly organized corporation to engage in operations as an air carrier and for an order authorizing control of such air carrier by American Export Lines, Inc., a common carrier by water. The Board dismissed the application for approval of control for reasons similar to the theory advanced by appellants herein, the Board having reached the conclusion that the statute applied only to cases where the acquisition of control occurred at a time when the corporation was already an air carrier. A unanimous court of appeals refused to interpret so narrowly the common control provisions of the Civil Aeronautics Act, stating by Judge Augustus N. Hand:

> "This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter * * * an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition'." (p. 815)

The decisions in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384 (C.A. D.C. 1952) and *Continental Southern Lines, Inc. v. Civil Aeronautics*

Board, 197 F.2d 397 (C.A. D.C. 1952) cert. den., 344 U.S. 831, are in accord and expressly follow the *Pan American* decision.

Appellants seek to distinguish these Civil Aeronautics Act cases on the basis of immaterial differences in statutory terms and purported differences in "legislative philosophy". Their effort is, to say the least, unpersuasive. Irrespective of any differences in emphasis or approach in general, the fact is that the common control provisions of the Civil Aeronautics and Interstate Commerce Acts are in all material respects comparable and are both directed to a common objective. Appellants point to the following proviso in Section 408 of the Civil Aeronautics Act* and urge that it serves to distinguish the Civil Aeronautics Act cases (Brief of appellants, p. 42):

> "*Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

But this proviso, only part of which was quoted by appellants, refers to the person *acquiring* control rather than the person *being controlled*. Thus, it does not furnish a basis for distinguishing the Civil Aeronautics Act cases where the issue concerned the carrier status of the person being controlled, rather than the status of the controlling carrier.

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*See Appendix, pp. 6-9, for the full text of Section 408.

The same issue—the carrier status of the person being controlled—is presented in the case at bar.*

D. THE POTENTIAL JURISDICTIONAL VOID.

The dangers implicit in appellants' theory of the limited scope of Section 5 have been recognized by this Court in rejecting any such interpretation of the meaning of "acquisition of control". In *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), it was said with respect to common control transactions that the crucial issue is "not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case, the parent can always, by operating through subsidiaries, make itself more remote." (p. 169) The Court continued:

> "Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress to oversee combinations and consolidations of carriers and 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *' and the further requirements that 'All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1." (pp. 170-1)

Similarly, the Court of Appeals for the District of Columbia Circuit in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384, *supra*, has warned against unduly restricting the Congressional dele-

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*Appellants also contend that "There is no comparable provision in Section 5 of the Interstate Commerce Act" (Brief of appellants, p. 42). However, the two acts are comparable even in this respect. See Sections 5(2)(b) and 5(3), Appendix, pp. 2-3.

gation of regulatory jurisdiction in the field of capital structures and inter-carrier relationships. Addressing itself specifically to the opportunity which would be afforded for successful evasion of the statutory objective if the agency's authority were to be restricted to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the agency's approval, the court said:

> "Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush that its relationships to other types of carriers are not subject to the restriction of § 408. It has been held, however, in Pan American Airways Co. v. Civil Aeronautics Board, 2 Cir., 1941, 121 F.2d 810, that the very process of certification brings the control relationships between the newly certificated air carrier and its parent within § 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade § 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under § 401. We agree with the Pan-American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate." (197 F.2d at 386)

The Interstate Commerce Commission has also shown an awareness of such problems. The Commission has repeatedly called attention to dangers of this character.*

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*The Commission's statement in *Raymond Bros. Motor Transportation, Inc.—Purchase*, 37 M.C.C. 431, 433 (1941), is typical:

> "Where, as in the instant case, a transaction involving purchase of the properties of a motor carrier is subject to the requirements of section 5, no part of such transaction may be lawfully consummated without our prior approval. To find otherwise would leave carriers free, especially in cases where

In an effort to close this void in the regulatory structure which would necessarily arise from adoption of their theory, appellants argue that the Commission should have acted under the limited jurisdiction conferred by Section 212(b) of the Act, 49 U.S.C. § 312(b). Appellants' suggestion is ill advised. Section 212(b), *by its terms*, is made expressly inapplicable to a transaction governed by Section 5 of the Act. As has already been demonstrated, and as both the Commission and the court below have held, this record presents a transaction within the Scope of Section 5 and therefore is governed by Section 5 rather than by Section 212(b). The latter section merely authorizes, subject to such rules and regulations as the Commission may prescribe, the transfer of any certificate or permit authorizing interstate operations. But the transaction herein includes more than a mere transfer of a certificate authorizing operations; acquisition of control of Golden Gate is the crucial element which makes the transaction subject to Section 5. As previously pointed out, the control of Golden Gate could not lawfully be acquired without an appropriate order made under Section 5. Appellants have receded from their original representation that this holding by both the Commission and the court below renders Section 212(b) "completely

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their operations duplicate each other, or are substantially duplicate, to secure a monopoly, without the necessity of our first considering the desirability of the transaction in the public interest, merely by the device of acquiring the intrastate rights and physical properties of a vendor motor carrier (or several vendors), the latter agreeing to abandon operations in interstate or foreign commerce." (p. 433)

See, also, the following Commission decisions illustrating the detrimental consequences if jurisdictional voids were to be created in this field: *Wilson Storage and Transfer Co.—Purchase*, 36 M.C.C. 221, 227 (1940); *Texas, New Mexico and Oklahoma Coaches, Inc.—Purchase*, 55 M.C.C. 269, 275 (1948); *Mooney—Control*, 56 M.C.C. 771, 781 (1950), 60 M.C.C. 103 (1954); *Bekins—Control*, 65 M.C.C. 56, 59 (1955).

meaningless" (Juris. st., p. 14). As appellants now recognize, Section 212(b) has direct application to all transfers which, because not more than twenty motor vehicles are involved in the transaction, are exempt under Section 5(10) of the Act. See *United States v. Resler*, 313 U.S. 57 (1941). But appellants now contend that Section 212(b) "would be deprived of any significant meaning" (Brief of appellants, p. 35) under the decision of the Commission and the court below.* That this is not so is illustrated by *Atwood's Transport Line—Lease—John A. Clarke*, 52 M.C.C. 97 (1950), cited by appellants at page 35 of their brief, where the Commission said:

> "For those small carriers desiring to effect the transfer of a certificate or permit from one to the other, a specific exemption was provided in section 5(10), *and other transfers of a certificate from a carrier to a person, not a carrier and not affiliated with a carrier*, are not subject to Section 5. The intent of the Congress obviously was to provide a means whereby such transfers could be effected easily and without delay under such rules as the Commission deemed appropriate." (Emphasis supplied.)

Thus there is a significant area in which Section 212(b) rather than Section 5, applies. However, the transaction approved by the Commission in the case at bar includes more than a mere *transfer of a certificate* from a carrier to a person not a carrier and not affiliated with a carrier; as we have pointed out the transaction involves an *acquisition of control* in addition to a transfer of a certificate. For that reason Section 5 applies to the transaction which may appropriately be described as "the control of two or

*They have now gone even farther afield in citing Section 312 of the Act, relating to water carriers, a section which has not previously been cited and which has no relevance to this case.

more carriers of sufficient size to be subject to section 5, where the transfer of a certificate may be involved." *Atwood's Transport Line—Lease—John A. Clarke, supra,* 52 M.C.C. at 108. There is thus no inconsistency between the *Atwood's Transport* case and the other Commission decisions discussed in Section B above, page 19.*

E. THE EXCLUSIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

When an order has been made in accordance with Section 5 of the Act, rested upon findings that the transaction complies with the exacting standards of Section 5, it conveys authority permitting such transaction to be carried into effect "without invoking any approval under State authority"; the Commission's authority is expressly declared by the terms of Section 5(11) of the Act to be "exclusive and plenary".

Seaboard Air Line Railroad Co. v. Daniel, 333 U.S. 118 (1948);

Schwabacher v. United States, 334 U.S. 182 (1948);

Thompson v. Texas Mexican Railway Co., 328 U.S. 134 (1946).

Of necessity, when interstate and intrastate services and transactions are related and commingled, the federal authority over both is complete and paramount. As said by this Court in *Houston East & West Texas Railway Co. v. United States,* 234 U.S. 342, 351-2 (1914):

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*Appellants seem to gain some comfort from the circumstance that the application herein included a prayer for authorization in the alternative under Section 5 or under Section 212(b). The fact is that the reference to Section 212(b) appears in the Commission's standard form prescribed for such applications, the purpose being to provide for cases, such as *A. W. Hawkins, Inc.—Purchase—Disher,* 70 M.C.C. 673 (1957), where there might be a question respecting the application of the exemption granted by Section 5(10) of the Act.

> "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

The essential supremacy of federal power when interstate and intrastate services are "inextricably intertwined" is well exemplified by this Court's decision in *Colorado v. United States*, 271 U.S. 153 (1926). Upon application of a carrier the Interstate Commerce Commission had authorized, under Section 1, paragraphs 18-20 of the Act, abandonment of a branch line of railroad lying wholly within the State of Colorado and operating in both intrastate and interstate commerce. We may note that the statute does not refer in terms to intrastate commerce. The applicable provision (paragraph 18) simply sets forth that no carrier by railroad "shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." The State of Colorado brought suit to enjoin the Commission's order but the bill was dismissed by the District Court. Upon appeal to this Court the State contended *inter alia* as follows:

"The Interstate Commerce Commission is without power to authorize the abandonment, as respects intrastate business, of a line of railroad wholly within a State, which is owned and operated by a corporation of that State;" (p. 155)

However, the Supreme Court affirmed the judgment of the District Court, without dissent. The opinion was by Mr. Justice Brandeis. The following excerpts from the opinion are pertinent here:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

* * * * * * *

"Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

* * * * * * *

"The sole test prescribed is that abandonment be consistent with public necessity and convenience. In deter-

mining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both." (271 U.S. at 164-166, 168)

Appellants' reliance, at pages 32 and 33 of their brief, upon the decision of this Court in *Chicago, M., St. P. & P. R. Co. v. State of Illinois*, 355 U.S. 300 (1958), is misplaced. That decision does not aid these appellants. The *Milwaukee Road* case arose upon an order of the Interstate Commerce Commission, made pursuant to Section 13(4) of the Act, authorizing an increase in rates "for suburban commuter service in the Chicago area * * *." The instant case, on the other hand, arises under Section 5 of the Act and the Commission has made no order, under Section 13(4) or otherwise, prescribing rates. Neither directly nor indirectly has the Interstate Commerce Commission here undertaken to fix or determine rates for intrastate service or otherwise. Under the transaction found by the Commission to be consistent with the public interest, *Golden Gate's* intrastate rates would continue to be subject to the regulatory jurisdiction of the California Public Utilities Commission to the same extent as at present (Tr. 29). Furthermore, even if the principles of the *Milwaukee Road* case could be deemed applicable to the instant case, the material facts are in no respect in parallel. In approving the *Golden Gate* transaction, the Commission has not failed to consider Greyhound's *entire* intrastate operations. On the contrary, the Commission found that at a time when, according to the actual findings of the California Public Utilities Commission, Pacific was operating under fares producing an estimated annual loss of $1,202,200 from its *overall intrastate* operations and a loss of $389,800 from its Marin County operations, the Cali-

fornia Public Utilities Commission authorized merely a token increase which was to produce only $84,000 in additional revenue (Tr. 17-20, 28). The Interstate Commerce Commission said in its report herein: "* * * we may not properly overlook the burden on the interstate operations of Pacific which the proposed transaction would alleviate" (Tr. 28). Thus the Commission took into account the results of Greyhound's entire intrastate operations as one of the circumstances warranting its concluding that the transaction was consistent with the public interest.*

The Commission has correctly determined that the Golden Gate transaction is within the terms and scope of Section 5 and properly exercised its "exclusive and plenary" jurisdiction in approving and authorizing the transaction.

II. There Was No Abuse of Discretion by the Court Below in Denying Appellants Leave to Amend Their Complaint.

We have previously pointed out that the complaint as filed raised but a single issue of law—whether the transaction was within the scope of Section 5 and therefore sub-

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*Appellants' "supplemental" brief with its attachment is not worthy of the dignity of passing notice. With respect to *Columbia Motor Service Co.—Purchase*, 35 M.C.C. 531 (1940), which appellants therein seek to distinguish, the following chronology may have some significance: (1) Date of Missouri Public Service Commission Order in Case No. T-7335—April 29, 1940; (2) Date of Interstate Commerce Commission report approving Columbia Motor Service transaction—June 12, 1940; (3) Date of enactment of Transportation Act of 1940 (54 Stat. 898)—September 18, 1940. For whatever reasons the parties to the Columbia Motor Service transaction sought approval for the transfer of operating rights first from the State and thereafter from the federal authority as well, the significant facts are: *first*, that the parties sought and received from the Interstate Commerce Commission authority approving the transaction *in its entirety*; and, *second*, that the order of the State Commission was issued prior to the enactment of the present Section 5(11) of the Act containing the "exclusive and plenary" clause. Thus, the parties' prior resort to, and the action by, the Missouri Commission have no relevance whatever to the issue before this Court.

ject to the exclusive and plenary jurisdiction of the Commission. In words excerpted from appellants' brief (p. 13):

> "The single ground on which the complaint challenged the validity of the order was that the proposed transactions did not come within the scope of Section 5 of the Interstate Commerce Act (R. 6-7)."

By the motion for leave to amend, appellants requested permission to add new allegations challenging the Commission's finding that the transaction was consistent with the public interest, challenging many subsidiary findings which were alleged to be without record support, and charging the Commission with an abuse of discretion in denying appellants' petition for rehearing and reconsideration. The motion for leave to amend was denied, and the sole resulting issue now before this Court is whether the District Court abused its discretion by such denial.

A. APPELLANTS HAD AMPLE OPPORTUNITY PRIOR TO FINAL ARGUMENT BEFORE THE DISTRICT COURT TO BRING BEFORE THE COURT ALL ISSUES DEEMED BY THEM TO BE PERTINENT.

The Commission's order was entered on July 6, 1955, and appellants filed their complaint seeking annulment of that order on October 18, 1955. Appellees had answered the complaint, intervening appellees had requested and obtained permission to intervene, the three-judge court had been convened, the motions directed to the complaint had been filed, the time for hearing thereon scheduled by the court, and counsel for the United States and the Commission had come to San Francisco from Washington, D.C.—all without any indication that appellants intended to request permission to amend the complaint. Counsel for appellants had even advised the court and appellees that the sole issue which he would present at the hearing was the jurisdictional issue. In fact, appellants had conceded that the case

was ready for final judgment by making their own motion for judgment on the pleadings, which was heard concurrently with the motions of appellees. The initial suggestion or indication that appellants might desire to ask leave to amend was made in the course of final argument on the motions to dismiss and for judgment on the pleadings on February 23, 1956. The actual motion for leave to amend the complaint was made after the only issue raised by the complaint had been submitted for decision. Appellants admitted that the proposed amendment related to issues known to them when the complaint was filed and that the failure to raise these issues was not due to inadvertence or oversight; the only explanation offered of record was that appellants' counsel had reappraised his case and now desired to make such a sweeping challenge to the basic findings made by the Commission. Appellants renew this same explanation (Juris. st., p. 18; Brief of appellants, pp. 19-20, 45).

The mere statement of the undisputed facts bearing upon this unusual last minute request establishes without question that the court below was manifestly justified in denying the motion, after having given appellants full opportunity to present any reasons they may have had in support of their request for leave to amend. The sole justification advanced implies that appellants had lost confidence in the only issue raised by their original complaint and therefore had decided to raise additional issues. The same attempted justification has now again been offered (Juris. st., p. 18; Brief of appellants, pp. 19-20, 45). When the complaint herein was filed, appellants' counsel was thoroughly familiar with the record before the Commission, having represented appellants during the entire proceedings. The appellants' decision not to challenge the Commission's findings was advisedly made. If there had been the remotest chance that

these findings were not fully supported by the record, it is inconceivable that appellants' counsel would have omitted to challenge them in the original complaint.

B. APPELLANTS HAVE ADVANCED NO SUBSTANTIVE REASON INDICATIVE OF NECESSITY TO AMEND THEIR COMPLAINT.

The sole reason of a substantive character offered by appellants in justification of their proposed amendment is that appellants' counsel was influenced by the negotiation of a labor contract between Pacific Greyhound and the Union alleged to be contrary to one of the Commission's public interest findings (Juris. st. p. 18; Brief of appellants, pp. 52-53). This suggestion can hardly be taken seriously since the fact of such negotiation does not contradict but expressly confirms the Commission's findings respecting the difficulties engendered in dealing with labor problems under existing conditions (Tr. 21, 29, 102). Moreover, the negotiation of this contract was undertaken and accomplished in response to the mandate of the Commission and in conformity with the policy of Section 5(2)(f) of the Act requiring protective conditions for labor. In its report herein, the Commission stated that: "Our approval of the transaction is with the expectation that applicants and the Union will make every effort to reach an agreement to protect all employees of Pacific and Golden Gate affected by the transaction, * * *" (Tr. 29). In our view, this suggestion on the part of appellants does not arise above the dignity of pretext; obviously appellants' prime objective was further delay, and for an extended period.

C. THE POLICY RESPECTING AMENDMENTS CANNOT BE SO "LIBERAL" AS TO FRUSTRATE THE EXPRESS CONGRESSIONAL INTENT TO ACCOMPLISH EXPEDITION IN JUDICIAL REVIEW OF ORDERS OF THE COMMISSION.

All of the factors to be considered by the court in exercising its discretion pursuant to Rule 15, Federal Rules of Civil Procedure, militated heavily against the motion for leave to amend.* There was no abuse of discretion in the court's denial of appellants' belated request for permission to challenge the Commission's findings upon the additional grounds set forth in the proposed amended complaint, no showing having been made to warrant appellants' *seriatim* attack on the Commission's order. Granting that there should be a liberal policy in permitting amendments, it does not follow that amendments should be allowed as of course and without good cause shown. While appellants' brief purports to disparage what is termed "The 'shotgun approach' of pleading a multiplicity of issues 'for good measure rather than for good reason'" (Brief of appellants, p. 52), it is plain that appellants' proposed amendment reflects this "shotgun approach" and would give rise to a multiplicity of issues requiring a formidable enlargement of the time required to hear and determine the case. The policy respecting amendments should not ignore the plain intent of Congress in providing for expedition in judicial review of orders of the Interstate Commerce Commission.

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*The following are some of the cases justifying denial of appellants' motion for leave to amend their complaint: *In re Hudson & Manhattan R. Co.*, 229 F.2d 616, 621 (C.A. 2d, 1956), *cert. den.*, 351 U.S. 982; *Calhoun County v. Roberts*, 148 F. 2d 901, 903-4 (C.A. 5th 1945); *Schaad v. New York Life Ins. Co.*, 79 F. Supp. 463, 468 (E.D. Tenn., 1948); *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn., 1948); *Friedman v. Transamerica Corp.*, 5 F.R.D. 115, 116 (D. Del., 1946); *Redmond v. O'Sullivan Rubber Co.*, 10 F.R.D. 536, 538 (W.D. Va., 1944); *Schick v. Finch*, 8 F.R.D. 639, 640 (S.D. N.Y., 1944).

Appellants seek to find an analogy between a complaint in ordinary litigation and a complaint seeking review and annulment of an order of the Interstate Commerce Commission. Thus it is said upon page 19 of the brief of appellants that "For all practical purposes, the situation is the same as if a plaintiff sought to amend his complaint after a ruling that he had not alleged facts sufficient to state a cause of action." (See also a suggestion to the same effect upon page 45 of the brief of appellants.) But the attempted analogy is wholly unwarranted since procedural practices in conventional litigation cannot be assimilated to the procedure specifically required by Congress in providing a special method for judicial review of orders of the Interstate Commerce Commission under the terms of the Urgent Deficiencies Act. (28 U.S.C. §§ 2321 to 2325). Congress has directed that, in disposing of complaints seeking review and annulment of orders of the Interstate Commerce Commission, the cases shall be speedily determined. Thus in *United States v. Griffin*, 303 U.S. 226 (1938), the Supreme Court said, speaking through Mr. Justice Brandeis, that "upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others" and that, in providing for this special type of judicial review, Congress sought "*to avert the delays ordinarily incident to litigation.*" (pp. 232-233) (Emphasis supplied.) It should be obvious that the circumstances confronting the District Court when appellants sought leave to amend their complaint have nothing in common with an ordinary case in which a plaintiff seeks for the first time to state the cause of action. Rather the instant case is one in which appellants are seeking to change the theory of their cause of action. This is not permissible in a case seeking annulment of an order of the Interstate Commerce Commission by a court specially con-

stituted under the terms of the Urgent Deficiencies Act. A more appropriate analogy would be to appeals in the course of which appellant may not be allowed to change his theory. See *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. United States*, 322 U.S. 1 (1944); *Helvering v. Wood*, 309 U.S. 344 (1940).

D. THAT THE DISTRICT COURT EXERCISED PROPER DISCRETION FINDS FURTHER WARRANT IN THE PREJUDICE WHICH APPELLEES WOULD HAVE SUFFERED HAD THE AMENDMENT BEEN ALLOWED.

We cannot too strongly emphasize the delay in the proceedings of the District Court which would inevitably have resulted if applicants had been permitted to amend their complaint in accordance with their singularly belated proposal. Appellants' suggestion that "The amendment would not have delayed final submission of the case for any long period of time * * *" is incredible (Brief of appellants, pp. 20-21). The fact is that the record before the Interstate Commerce Commission was not then available for presentation to the court. It would therefore have been necessary to await the production of a certified copy of the record from the Commission. Thereupon steps would be taken to reconvene the statutory three-judge court, counsel for the Interstate Commerce Commission and the United States would be under the necessity of returning to San Francisco from Washington, D.C., and then, upon receipt of the record, the court would proceed to determine whether there was merit in any of the contentions of appellants as to lack of support for the Commission's findings. This could not be accomplished in superficial fashion; the required task is inherently time-consuming. After full hearing new briefs would be filed, doubtless supplemented by oral argument, and the case would be submitted upon the expanded record. We need not speculate as to the time required to enable the

District Court to act advisedly in response to the multiplied issues and the expanded record. It will suffice to observe that it would be formidable. By the same token, if this Court were to remand the case at this time to the District Court with instructions to allow the requested amendments, not less than two additional years might well elapse before this case could be brought to a conclusion. In conjunction with the time already passed, the aggregate might well reach five years. Surely this would plainly disregard the Congressional intent in providing for expedition in judicial review of the Commission's orders under the provisions of the Urgent Deficiencies Act.

Appellants have already succeeded in delaying action under authority of the Commission's order for a period now approaching three years. It would seem that this litigation has already consumed excessive time and that to delay it further would be directly in derogation of the express intent of Congress in providing for speedy judicial review of orders of the Interstate Commerce Commission. It is suggested in the dissenting opinion below that "no defendant will suffer any substantial prejudice by permitting plaintiffs to amend their complaint". (Tr. 123). This observation is plainly in error. Greyhound has suffered a delay approaching three years in undertaking to avail itself of the authority granted by the Commission's order for corporate reorganization. It is still burdened with what the Commission has termed "the impractical retention in a single entity of highly dissimilar operations" which, as the Commission adds, "causes the undesirable results shown by this record" (Tr. 27). To extend these burdens and disadvantages for an indefinite period in the future certainly means "substantial prejudice" and this is prejudice to the public, no less than to the carrier, and in derogation of the

National Transportation Policy, as the Commission has determined. More than this, the Interstate Commerce Commission itself would suffer "substantial prejudice" by a ruling of our highest Court giving sanction to a *seriatim* attack upon the Commission's orders, permitting litigants to limit complaints to a single issue with freedom to amend, upon the trial of the cause several months thereafter, so as to multiply the grounds of attack. Approval of such a practice would materially aggravate the burden resting upon the Commission in defending its orders and would set at naught the Congressional intent for expedition in the processes of judicial review.

Presumptively we are not under the necessity of taking further note of the "concurring and dissenting opinion" below since enough has been said heretofore to answer its substance. Herein there are no "circumstances" which could remotely serve to sanction the proposed amendments "in the exercise of a sound and liberal discretion." We feel warranted in observing that the dissenting opinion seems to imply that it was the duty of the court to act virtually as an appellate Interstate Commerce Commission, with freedom to disapprove the conclusions of the Commission that the proposed transfer of certain transportation properties and services in the San Francisco Bay area to a separate subsidiary corporation would be in the public interest. We are confident that this Court will not conclude that the District Court was sitting virtually as an appellate administrative tribunal with freedom to substitute its judgment for the judgment of the Commission as to what is required, in the public interest, in dealing with corporate structures of common carriers, under applicable statutory provisions and in furtherance of the National Transportation Policy. This is within the exclusive province of the Commission.

It is well settled that motions to amend a pleading are within the sound discretion of the trial court, and upon this record there can be no warrant for finding an abuse of discretion on the part of the District Court in denying appellants permission to amend their complaint.

CONCLUSION

For the reasons herein set forth, the judgment below should be affirmed.

Respectfully submitted,

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(Appendix Follows)